IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO.189/2004

Mr. Corneli Peter,
52 years of age, married,
Indian National, native of Kerala,
Director of Tetra Queen
Distilleries Pvt. Ltd.,
and residing in the premises of
M/s. Tetra Queen Distilleries,
Mollem, Sanguem, Goa. .... Petitioner.

VERSUS

1. STATE,
   Through Crime Branch,
   C.I.D.,
   Dona Paula, Goa.

2. Public Prosecutor,
   State of Goa. ....

Respondents.

Shri S.G. Dessai, Senior Advocate with Shri Arun Bras de Sa, Advocate for the Applicant

Mr. S.N. Sardessai, Public Prosecutor for the Respondents

CORAM; N.A. BRITTO, J.

DATE; 30th AUGUST, 2004.

ORAL ORDER:

Heard Shri S.G. Dessai, the learned Senior Counsel on behalf of the Applicant and Shri S.N. Sardessai, the learned Public Prosecutor on behalf of the Respondents.

2. The Applicant is allegedly involved in Cr. No. 216/2004 under

Sections 468, 485 I.P.C. and Section 63 of the Copy Right Act 1957. The said offence was registered on 22.7.2004. Thereafter the Applicant approached the Court of Sessions, Panaji, with his application dated 12.8.2004 for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (Code, for short). The said application came to be decided on 20.8.2004, not by the learned Sessions Judge, Panaji, but by one of the Assistant Sessions Judges.

3. At the time of hearing of this application, the point raised is whether the learned Assistant Sessions Judge was competent to entertain and decide an application made under Section 438 of the Code.

4. Sub-section (1) of Section 438 provides that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail (emphasis supplied).

5. By virtue of sub-section (1) of Section 10 of the Code, all Assistant Sessions Judges are made subordinate to the Sessions Judge in whose Court they exercise jurisdiction. Appeals from sentences passed by Assistant Sessions Judges are made appealable to the Sessions Judges, also. For all purposes the Sessions Judge in the

judicial hierarchy stands higher than the Assistant Sessions Judges appointed in the Court of Sessions. In my opinion when Section 438 of the Code has conferred extraordinary powers to admit certain persons to anticipatory bail, the said powers have been conferred only on the High Court or the Court of Sessions. If the said power has been given to the Court of Sessions, certainly, it could not be contemplated to be exercised by an Assistant Sessions Judge. I am therefore of the opinion that an application for anticipatory bail could not have been entertained and disposed by an Assistant Sessions Judge. Consequently the impugned Order denying bail to the applicant by the learned Assistant Sessions Judge has got to be set aside as being one without jurisdiction.

6. I am fortified in my view by the observations of the Supreme Court in the case of **G. S. Sibbia (1980 Cri.L.J. 1125)** wherein the Supreme Court stated that:-

" There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are highest courts manned by experienced persons, secondly, their orders are not final, but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy " (emphasis supplied).

7. The aforesaid observations could not have been intended to

refer to an Assistant Sessions Judge.

8. There has been a long standing practice in both the Districts/Sessions Divisions by which such applications were disposed off by the Sessions Judges themselves. The reasons for departure from this practice are not known. The Court of Sessions was not right in allotting the application to be decided by an Assistant Sessions Judge. A submission has been made on behalf of the parties that the application be decided by this Court because this Court also has concurrent jurisdiction. I am not inclined to accept the submission. It is true that the High Court and the Court of Sessions have got concurrent jurisdiction to entertain applications under S.438 of the Code but it is certainly desirable and it is also ordinary practice that the Court lower in hierarchy should decide the application first.

9. Consequently direction is required to be given to the learned Sessions Judge, Panaji, to dispose of the anticipatory bail application filed by the applicant as expeditiously as possible.

10. Shri Dessai, the learned counsel on behalf of the Applicant submits that the applicant be protected until the disposal of his application by the learned Sessions Judge. I am inclined to accept the submission. The I.O. is hereby directed not to arrest the applicant until the final disposal of the application filed by the applicant by the learned

Sessions Judge, Panaji.

11. The Applicant is hereby directed to remain present before the learned Sessions Judge on 1.09.2004 at 10.00 a.m.

12. Copy be expedited. A copy be sent to the Sessions Judge, Margao, for information.

N. A. BRITTO, J.

sl.